



DATE: April 8, 1998

CASE NO. 96-INA-101

In the Matter of:

**ASSOCIATION FOR CHILDREN WITH
RETARDED MENTAL DEVELOPMENT,**
Employer,

on behalf of

MARY ANNE TANGULAN SYQUIA,
Alien.

Appearances: Harlan E. Schackner, Esq.

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from Association For Children With Retarded Mental Development's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification on behalf of Mary Anne Tanguan Syquia ("Alien").¹

This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On November 16, 1994, the Association for Children with Retarded Mental Development, a day treatment program, filed an application for alien employment certification on behalf of the Alien, Mary Anne Syquia, to fill the position of Habilitation Services Practitioner. The job to be performed was described as follows:

¹ The certification of aliens for permanent employment is governed by §212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20 Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited to in this decision are in Title 20.

Provide basic services to clients, i.e. personal and self-care. Participate in the interdisciplinary team. Serve as client coordinator. Maintain appropriate client records. Cooperate with over-all program. Perform all other duties and responsibilities related to well being of the developmentally disabled.

Minimum requirements for the position were listed as a BA/BS in Psychology, Education or Social Work and one year experience in the job offered or in the related occupation of Teacher. (AF 7-8).

Employer received fifteen applicant referrals in response to its recruitment efforts, all of whom were rejected for various reasons. Specifically, and at issue here, several were rejected for lack of experience working with the mentally retarded. (AF 91-95).

A Notice of Findings, (NOF), was issued by the Certifying Officer (CO) on April 10, 1995, proposing to deny labor certification based upon a finding that Employer had rejected qualified U.S. workers for other than lawful or job-related reasons (AF 106-109).² Citing the Employer's stated minimum experience requirements as either one year experience in the job opportunity or one year of experience as a "Teacher", the CO identified three applicants she determined appeared qualified for the position. As relevant herein, the CO noted applicant Spanakos has a B.S. in Education and over 25 years experience as a "Teacher." The CO challenged his rejection on the basis he "lacks experience working with the mentally retarded" on two bases: one, that it is not a stated or advertised minimum requirement and two, because "the alien's qualifying experience was as a 'teacher' without experience 'working with the mentally retarded'." The CO commented that "Mr. Spanakos is as qualified as the alien was at the time of hire; employer appears to have added a requirement (working with mentally retarded) after advertising".

In rebuttal, Employer reiterated its basis for rejecting applicant Spanakos, that he has no experience working with the developmentally disabled. Employer maintains that because experience required in the job offered means experience performing the listed job duties, it follows that required experience not specified as such, (i.e. Employer's alternative "Teacher" experience requirement), "is also deemed to include or to incorporate those listed duties". Thus, Employer asserts that "Mr. Spanakos, devoid as he is of experiences with the mentally disabled, was rightfully rejected by ACRMD for his inexperience in some key duties required by the job offered . . .". Employer disputes the Alien's lack of experience with the mentally retarded, citing her work with the Cupertino Center for Special Children. In addition, Employer further explained its basis for rejecting the two other applicants cited by the CO. (AF 110-123).

A Final Determination denying labor certification was issued by the CO on May 22, 1995,

² Three prior NOFs were issued with respect to a prevailing wage issue which was resolved prior to the issuance of the NOF (AF 25-28; 44-46; 56-57).

based upon a finding that Employer had failed to document lawful, job-related reasons for the rejection of applicant Spanakos (AF 124-127). Rejection of the two other applicants cited was accepted and no longer at issue. Citing Employer's responsibility to state and advertise its actual minimum requirements for the petitioned for position, the CO stressed the fact that there were no special requirements specifying what type of teacher would be acceptable under Employer's alternative experience requirement. Thus, she concluded applicant Spanakos' 26 years teaching experience together with the required degree qualifies him for the position. In addition, the CO again observed that the Alien, at the time of hire, lacked one year experience teaching the "developmentally disabled"; hence, this could not be a minimum requirement.

Employer requested reconsideration of the denial determination by letter dated June 26, 1995 which was denied by the CO. (AF 129-132). A Request for Administrative-Judicial Review was filed by the Employer on October 20, 1995. (AF 136-138).

DISCUSSION AND CONCLUSION

Federal regulations at 20 C.F.R. §656.21(b)(2), require an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States. Pursuant to 20 C.F.R. §656.21(b)(5), an employer must document that its requirements for the job opportunity are the minimum necessary for the performance of the job and that it has not hired or that it is not feasible for it to hire workers with less training and/or experience.

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. 20 C.F.R. §656.24 (b)(2)(ii). Section 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons.

In the instant case, Employer's stated requirements for the petitioned position included a B.A. or B.S. degree in the fields of psychology, education or social work and one year of work in the job offered (Habilitation Services Practitioner) or the related occupation of teacher. Employer contends that the ETA-750A and the advertisement in this case show clearly that this is not a teaching job but a social casework type of position. Employer asserts that the information provided "makes it clear to any reader that the 'teaching' experience required must be related to the job, whether in the type of population taught, the academic discipline taught, the teaching techniques employed, so as to be at least minimally applicable to this position, which is NOT a teaching job at all". We are persuaded by Employer's argument, as similar to the facts in Hunt Chemicals, Inc., 90-INA-303 (July 22, 1991), "it was logical to conclude that, where the CO did not challenge the requirement of experience in the specific industry, the alternative requirement of [one] year experience as a [teacher] was intended to be in the same field". Nonetheless, we still

conclude that labor certification was properly denied, inasmuch as accepting Employer's minimum experience requirement to be one year in the job offered or as a teacher in that field (the mentally retarded), the record reflects that the Alien did not meet the Employer's stated minimum experience requirement at the time of hire.³ Thus, Employer is specifically rejecting a U.S. applicant for lack of one year experience working with mentally retarded while the Alien lacked that experience at the time of hire as well. Accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of

³ We note that in rebuttal Employer argued that Alien gained the requisite experience while employed at the Cupertino Center for Special Children; however, this experience does not equal one year of full-time experience as it was a part-time position for the period of only fourteen months (AF 117).

the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

